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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 32

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

J. H. RUTTER REX MANUFACTURING CO, INC., et al
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF ON BEHALF OF J. H. RUTTER REX MANUFACTURING COMPANY, INC., Respondent

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SUPPLEMENTAL BRIEF FOR J. H. RUTTER REX MANUFACTURING COMPANY, INC., Respondent

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MAY IT PLEASE THE COURT:

This supplemental brief is filed to include and comment upon an excerpt from the prior brief of the National Labor Relations Board referred to in footnote 18 at page 20 of the Board's brief to this Court, but not included in the Joint Appendix. In footnote 18, the Board refers to its earlier brief to the Fifth Circuit Court of Appeals in case No. 16422, filed in opposition to Rutter Rex's motion seeking to enjoin the backpay proceeding

because of the Board's delay, as evidence that the Board stated that "it would consider whether that factor[1] should be taken into account . . .". The following is the language to which the Board referred in its brief in Case No. 16422:

> "Movant asserts, however, that to permit the Board to proceed with the backpay hearing will cause it irreparable injury in that 'if the Board is permitted to proceed with the scheduled hearing, movant will be faced with possible liability for backpay accruing during the period of the Board's delay' in instituting such proceedings (Motion, par. 20). Whatever the merits of movant's contention that the Board's alleged delay should relieve it from its duty to make the injured employees whole (see discussion, *infra*, pp. 29-31), the statutory review procedure affords the Company an adequate means for obtaining both administrative and judicial evaluation of its claim. Thus, whatever 'delay' there may have been in setting a backpay hearing is over. The effect of past 'delay' both as to the amount of backpay due and as to the Company's ability to present evidentiary material with respect to the matters encompassed by the backpay specification are questions which can be, and are best, litigated before the Board. *Moreover, if movant deems itself aggrieved by the Board's ultimate determination, '* * * application can be made to this Court * * * to set [it] aside.' N.L.R.B. v. Rutter-Rex Manufacturing Co., supra* at 598, n.5; *N.L.R.B. v. Royal*

[1]The word "factor" refers to the Board's delay.

Palm Ice Co., supra; Home Beneficial Life Insurance Corp. v. N.L.R.B., supra.

"Indeed, it is only if the Board rejects movant's arguments that it could be aggrieved by the Board's 'delay' in instituting backpay proceedings. *But it may well be, for all that is presently known, that as a result of the evidence adduced at the hearing, the Board will conclude that this delay should be taken into account in fixing the amounts of backpay due.* 'The remedy of backpay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act. And in applying its authority over backpay orders, the Board has not used stereotyped formulas, but has availed itself of the freedom given by Congress to attain just results in diverse, complicated situations.' *Phelps-Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 198." (Emphasis supplied).[2]

This statement was made to the Fifth Circuit by the General Counsel at a stage of the case at which the General Counsel's purpose was to persuade the Fifth Circuit not to enjoin the backpay proceeding on the grounds of the Board's delay.[3] In this context, the Board,

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[2]Brief for the National Labor Relations Board, *J. H. Rutter-Rex Mfg. Co. v. National Labor Relations Board*, No. 16422 in the United States Court of Appeals for the Fifth Circuit, pp. 14-16 (1962).

[3]The period of delay was 4 years and 11 months, from the date of the Court of Appeals' opinion on June 10, 1957, to November 16, 1961, the date on which the backpay specification was filed (R.1). Meanwhile, on October 24, 1957, the company furnished the Board the names of the employees who had gone on strike, the dates upon which the strikers applied for reinstatement, and the dates of reinstatement (R. 625-630). On October 31, 1957, the company furnished its payroll records indicating hourly and weekly earnings and the numbers

in the language emphasized above, advised the court of appeals that the Board might conclude, and hence could conclude, that "delay should be taken into account in fixing the amounts of backpay due". It is a fair interpretation of this language to understand from it that, at that stage of the case, the General Counsel conceded that it would be proper to consider the Board's delay in determining the amount of backpay awarded. This is contrary to the position now taken by the Board, which is that any modification of the backpay awarded because of the delay factor is an application of the doctrine of laches to defeat a public right.

There is a basic contradiction in the position taken by the General Counsel in persuading the court of appeals not to enjoin the backpay hearing and the position now urged by the Solicitor General. In order to persuade the court of appeal not to enjoin the backpay hearing, the General Counsel represented to the court of appeals that the Board would consider the delay factor and might conclude that the Board's delay should be a factor in framing the backpay remedy. After persuading the court of appeals not to enjoin the hearing, the Board, in its supplemental decision and order, ignored the delay factor (R. 3). The court of appeals then modified the Board

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of the various operations in the plant (R. 631). The letter of November 7, 1957 (R. 632), seeking the Board's cooperation in complying with the decree, elicited no response from the Board. Again, on October 27, 1961, in complying with the Board's belated requests for further information, counsel for the company invited discussion with the Board (R. 887-897). The Board filed the specification without any offer of cooperation or attempt to settle. The Board's attitude throughout the case has been as stated at page 30 of its brief to the Court of Appeals in Case No. 16422 (the injunction motion):

> "Moreover the Board was under no obligation to take affirmative steps to call to movant's attention the particulars in which it did not believe movant had complied with the reinstatement obligation imposed by this Court's decree."

order because of the Board's unreasonable delay and the argument is now made to this Court that the Board could not consider the delay factor because such consideration would involve the application of the doctrine of laches to defeat a public right. The Board argues that the Fifth Circuit is in error as a matter of law in modifying the award because of the delay factor.

It is a dangerous argument when an agency asserts that a reviewing court has no right to look into and evaluate the impact of its delays in a given case. It is unlikely that it was the intention of Congress in drafting Sections 10(e) and 10(f) of the National Labor Relations Act (29 U.S.C. §§ 160 (e), (f)) and Sections 6(a) and 10(e)(B)(1) the Administrative Procedure Act (5 U.S.C. (1964 ed.) §§ 1005(a), 1009 (e)(B)(1)), to vest such complete discretion in an administrative agency as to make that agency the ultimate judge, not only of the conduct of the litigants before it, but of its own conduct as well. The Board has no expertise which makes it better qualified than the court of appeals to judge the Board in the matter of the Board's delay. On the contrary, it is reasonable to suggest that a reviewing court is better qualified to make an objective judgment of whether unreasonable delay has occurred. Administrative expertise provides no basis for the limitation of judicial review except in matters within the special competency of the agency. In the language of Justice White in *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167, 83 S.Ct. 239, 245 (1962).

> "Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of mod-

> ern government, can becc me a monster which rules with no practical limits on its discretion'."

In refusing to permanently enjoin the backpay proceeding, the Fifth Circuit said:

> "In effect, counsel for the Board has admitted the obvious assertion of the employer that there has been inordinate delay in this case. While the delay is regrettable, we are unwilling to exercise the power of this Court to permanently stay the administrative proceedings instituted by the Board and therefore, the motion for a permanent stay is hereby Denied. *It seems appropriate to comment that the administrative proceedings involved remain subject to judicial review.* At this time we simply conclude that we should not take any further action with respect to the proceedings before the Board prior to such time as a final order is entered by the Board, or other final action taken, without passing upon the question of the court's jurisdiction to grant such permanent stay or whether the court has or ought to exercise the power to stay such administrative proceedings."[4] (Emphasis supplied)

Bearing in mind that the General Counsel implied, if he did not state, to the court of appeals that the Board's delay was a proper factor to be considered in fashioning the backpay remedy, it is fair to understand the language emphasized in the above quotation as indicative of the reviewing court's expectation that the delay factor *would* be considered by the Board, and that this ex-

[4] *N.L.R.B. v. J. H. Rutter-Rex Mfg. Co.*, 305 F.2d 242, 244 (1962).

pectation was a part of the court's reasoning in denying injunctive relief. This interpretation of the court's language is supported by the fact that the court of appeals *did* modify the Board's remedial order on the basis of the Board's delay after the backpay hearing was conducted and the Board fashioned an order which ignored the delay factor.

The Board's representatives have changed the direction of their argument. In presenting this case to the Fifth Circuit Court of Appeals, the Board (1) admitted inordinate delay and (2) admitted that this delay could properly be taken into account in determining the amount of backpay due. The Solicitor General and the General Counsel now deny both of these propositions, and contend that there was no delay, and that if there was, the court of appeals had no right, as a matter of law, to modify the Board's order because of the delay.

Respectfully submitted,

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